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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 MATTHEW ROBERT DESCAMPS,

11 Defendant.

NOS: 05-CR-104-RMP
15-CV-196-FVS

ORDER DISMISSING 28 U.S.C. §
2255 MOTION AND DENYING
MOTION TO APPOINT COUNSEL,
AND TO FILE SUBSEQUENT 28
U.S.C. § 2255 MOTION

12 BEFORE THE COURT is Defendant Matthew Robert Descamps' motion to
13 vacate, set aside, or correct sentence under 28 U.S.C. § 2255, ECF No. 610, and
14 motion for appointment of counsel, authorization to file a successive 28 U.S.C. §
15 2255 motion, and request for a hearing, ECF No. 633. Defendant appears pro se in
16 the above matters. The Court has reviewed the motions, the judgment, all other
17 relevant filings, and is fully informed.

18 **Background**

19 Plaintiff was convicted under 18 U.S.C. § 922(g)(1). ECF No. 407, 629. On
20 March 24, 2014, the Court entered a Resentencing Judgment in relation to the
21 above conviction. ECF No. 579. On March 31, 2014, Defendant appealed his

1 March 24, 2014, sentence to the Ninth Circuit Court of Appeals. ECF No. 587.
2 On July 27, 2015, Defendant filed with this Court a motion to vacate, set aside, or
3 correct the sentence under 28 U.S.C. § 2255 on multiple grounds, ECF No. 610,
4 currently pending.

5 On September 17, 2015, Defendant received relief on appeal with the Ninth
6 Circuit granting his unopposed motion to remand. ECF No. 615. Prior to
7 resentencing, Defendant filed an application for authorization to file a second or
8 successive 28 U.S.C. § 2255 motion with the Ninth Circuit Court of Appeals,
9 which was denied as premature because Defendant had not yet been resentenced
10 following the September 17, 2015, Ninth Circuit Court of Appeals ruling ordering
11 resentencing. ECF No. 632. On November 18, 2015, Defendant was resentenced
12 for the above conviction to time served with twenty-one months of supervised
13 release. ECF No. 629. On November 23, 2015, the Ninth Circuit Court of
14 Appeals denied as premature Defendant's motion to file a successive 28 U.S.C. §
15 2255 motion. ECF No. 632. On February 5, 2016, Defendant filed a request for
16 hearing, motion to appoint counsel, and motion for permission from the district
17 court to file a successive 28 U.S.C. § 2255 motion, ECF No. 633, currently
18 pending.

19 **A. Motion under 28 U.S.C. § 2255.**

20 No defendant in a federal criminal prosecution is entitled to have a direct
21 appeal and a 28 U.S.C. § 2255 motion considered simultaneously, except in

1 extraordinary situations. *Jack v. U.S.*, 435 F.2d 317, 318 (9th Cir. 1970). Here,
2 Defendant's filing of the 28 U.S.C. § 2255 motion, ECF No. 610, prior to a
3 determination on his appeal was premature. Since the Ninth Circuit Court of
4 Appeals found in Defendant's favor and remanded the case back to this Court for
5 resentencing prior to the Court's ruling on Defendant's 28 U.S.C. § 2255 motion,
6 ECF No. 610, this Court now must address ECF No. 610 in light of the Ninth
7 Circuit Court of Appeals' remand and the resentencing by this Court.

8 The Court notes that Defendant's July 27, 2015, 28 U.S.C. § 2255 motion,
9 ECF No. 610, was his fourth 28 U.S.C. § 2255 motion brought in this case. See
10 ECF No. 467, 468, 489. All three of Defendant's prior § 2255 motions were
11 dismissed without prejudice by the Court as premature. ECF No. 473, 502.
12 Defendant was not required to request permission to file subsequent § 2255
13 motions from the Ninth Circuit as a habeas claim that is dismissed as premature
14 "should be treated in the same manner as the claim of a petitioner who returns to a
15 federal habeas court after exhausting state remedies." *Stewart v. Martinez-*
16 *Villareal*, 523 U.S. 637, 643, 118 S. Ct. 1618, 140 L.Ed.2d 849 (1998). Here,
17 Defendant's motion, ECF No. 610, was premature, and because his sentence was
18 vacated following a successful appeal, this motion was never ripe. As such, the
19 Court views this dismissal of Defendant's motion, ECF No. 610, as moot
20 analogous to the dismissal as premature addressed in *Stewart*.

1 Defendant's current § 2255 motion, ECF No. 610, challenges a sentence that
2 has since been overturned. Therefore, the allegations raised as to the overturned
3 sentence are moot. As such, this motion is dismissed without prejudice. *See* 28
4 U.S.C. § 2255(b); Rules Governing § 2255 Cases, Rule 4(b).

5 **B. Motion for appointment of counsel, authorization to file a successive 28
U.S.C. § 2255 motion, and request for a hearing.**

6 Considering Defendant's motion for appointment of counsel, authorization
7 to file a successive 28 U.S.C. § 2255 motion, and request for a hearing, ECF No.
8 633, is based on the July 27, 2015, 28 U.S.C. § 2255 motion, ECF No. 610, which
9 the Court has determined is moot because the underlying sentence was overturned,
10 the Court denies Defendant's motion for appointment of counsel, authorization to
11 file a successive 28 U.S.C. § 2255 motion, and hearing, ECF No. 633, also as
12 moot. Accordingly,

14 **IT IS ORDERED** that:

15 1. Defendant's motion to vacate, set aside, or correct his sentence
16 pursuant to 28 U.S.C. § 2255, ECF No. 610, is **DENIED** as moot and dismissed
17 without prejudice.

18 2. Defendant's motion for appointment of counsel, authorization to file a
19 successive 28 U.S.C. § 2255 motion and request for a hearing, ECF No. 633, is
20 **DENIED** as moot.

The District Court Executive is hereby directed to enter this order and furnish copies to Defendant. The District Court Executive is further directed to **CLOSE** this case as well as the corresponding civil case: **15-CV-196-FVS**.

DATED this 30th day of September 2016.

s/Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
United States District Judge